tion in advance described above. I would therefore allow the claim for the rent.

Learned counsel for the plaintiffs, in his written submissions, has asked for interest which I have a discretion to award under section 11 of the Civil Law Act, 1956, on the rent claimed and allowed. I will allow it.

After crediting and therefore deducting the deposit of $11,857.50 paid by the defendant, I give judgment to the plaintiffs for the sum of $71,910/– being arrears of rent together with interest at 4% per annum thereon from May 16, 1977 to date of judgment, and thereafter at the rate of 8% per annum to date of payment, with costs to be taxed.

Before departing from this case, I must congratulate Mr. Yong, the learned counsel for the plaintiffs in preparing and arguing this case very well indeed.

Claim allowed.

Solicitors: *Dato S.M. Yong & Co., Syarikat K.L. Rekhraj.*

PUBLIC PROSECUTOR v. MOHAMED ISMAIL

[O. Cr. J. (Edgar Joseph Jr. J.) March 22 to 24, 28 to 31; April 4, 6, 15 & 18; July 15, 1983]
[Penang – Criminal Trial No. 6 of 1982]

Dangerous Drugs – Cannabis – Accused in possession of 6.044 kg. cannabis – Sentencing – Mitigating factor – Accused unjustifiably shot at head by police – Life imprisonment and 6 strokes of rattan – Definition of cannabis – Dangerous Drugs Act 1952, ss. 2, 37(da) 39(B)(1)(a).

Criminal Law & Procedure – Possession of 6.044 kg. cannabis – Sentencing – Mitigating factor.

The accused was caught in a police ambush on November 30, 1981 at about 9.45 pm. He was a pillion rider on a motor-cycle. He was seen hugging a white bundle with his right hand, at the same time resting it on his right thigh. There was also another motor-scooterist with him who made good his escape. The police fired three warning shots, one of which hit the accused in the head. The motor-cyclist in his haste to get away lost control of his machine, causing the pillion rider to be dislodged and fall to the ground, unconscious and bleeding from his head. The motor-cyclist, too, made good his escape. The accused who was caught had 6.044 kgs. of cannabis, in contravention of s.39 B(1)(a) of the Dangerous Drugs Act 1952 (the Act).

Held: (1) the court was satisfied on the evidence taken as a whole that the prosecution had proved the charge against the accused beyond all reasonable doubt. The presumption under s. 37(da) of the Act having arisen and there being no rebuttal of the same, the accused should be found guilty as charged and convicted;

(2) on the evidence and the circumstances of the case taken as a whole, the court was satisfied that the accused was deliberately and unjustifiably shot at in the head by Inspector Mahadi. But for timely surgical attention the accused may well have succumbed to his injuries. The culpability on the part of Inspector Mahadi was a factor to be taken into consideration in assessing sentence. The accused would therefore be sentenced to life imprisonment and only 6 strokes of the rattan as opposed to the maximum of 24.

[*Editorial Note:* The appeal both by the Public Prosecutor against sentence, and the accused against conviction, in Federal Court Criminal Appeal No. 22 of 1983 were withdrawn on November 8, 1983 and November 21, 1983 respectively.]

Cases referred to:

(1) *R.* v. *Goodchild (No. 2)* [1978] 1 All E.R. 649.
(2) *Public Prosecutor* v. *Puteh Nordin bin Abdul Rahman* [1983] 2 M.L.J. 292.
(3) *Chang Liang Sang & Ors.* v. *Public Prosecutor* [1982] 2 M.L.J. 231.

CRIMINAL TRIAL.

Mohamed Nordin bin Haji Sulaiman (Deputy Public Prosecutor) for the Public Prosecutor.
R. Rajasingam for the accused.

Cur. Av. Vult.

Edgar Joseph Jr. J.: At about 7.00 p.m. on November 30, 1981, A.S.P Mohd. Ariff bin Hamid (P.W.1), a member of the Criminal & Marine Division of the Penang Port Commission ('P.P.C.'), had had his dinner and was resting at home, when he received a telephone message informing him that cannabis would be conveyed on motor cycles proceeding from the direction of certain godowns in the P.P.C. area later that night. A.S.P. Ariff wasted no time in organising an ambush party consisting of himself and six others – all auxiliary police personnel attached to the P.P.C. – and by 8.30 p.m. they had taken up ambush positions at various strategic points on the P.P.C. premises.

It would be tedious and unnecessary to recount in detail the testimony of the members of the ambush party who gave evidence and what I propose to do is to merely touch on the essential facts established by that testimony.

The ambush party did not have to wait long

because by 9.45 p.m., two motorists, one on a Vespa scooter and another on a motor cycle which was said to resemble a Scrambler, appeared on the scene.

The scooter, followed closely by the motorcycle, emerged from a lane separating two godowns, marked F2 and G2. Constable Ahmad bin Noor Ahmad (P.W.8), who was lying in wait, using his walkie talkie, immediately alerted Constable Mohd. Noor bin Salleh (P.W.3), who was stationed between godowns G1 and G2 as they passed him by and the latter in turn alerted A.S.P. Ariff who was waiting in his car near a car shed opposite the Port Labour Board Building. Also with Ariff was another officer, Mahadi bin Ahmad (P.W.2), who was waiting in another police patrol car.

No less than three members of the ambush party, namely, Mahadi bin Ahmad (P.W.2), Mohd. Noor bin Salleh (P.W.3) and Ahmad bin Noor Ahmad (P.W.8), testified that they saw that the motor scooterist had, resting on the foot rest and between his legs, a bundle or sack. On the motorcycle, was a pillion rider who hugged a white bundle with his right hand, at the same time resting it on his right thigh.

A.S.P Ariff took the obvious step – he decided to stop both the scooterist and the motor-cyclist by blocking their path. He did this with the help of his colleague. Both of them drove their cars and stopped directly in the path of their targets. A.S.P Ariff immediately got out of his car and shouted out "Berhenti, berhenti, Polis" but the Vespa rider paid no heed he swerved and made good his escape. The motor cyclist reacted differently – he made a u-turn. As he did so, Mahadi (P.W.2) shouted "Berhenti, berhenti, polis", and fired three shots, he claimed, in the air. The defence claimed that three shots were aimed at the accused and one of them at least struck him. I shall consider this aspect of the case later, as in my judgment it is really a collateral issue and lest it interrupt the narrative of events. The motor-cyclist ignored the warning and the gun shots but, in his haste to get away, he lost control of his machine, causing the pillion rider to be dislodged and to fall to the ground, unconscious and bleeding from his head, bringing down with him the bundle he was hugging. The motor-cyclist was however lucky – he, too, made good his escape. Not so the pillion rider, because both A.S.P Ariff and Mahadi (P.W.2) pounced upon him. That person was none other than the accused. A.S.P. Ariff made a positive identification to that effect and took immediate possession of the bundle, which lay beside the accused. He opened the bundle, which was tied at its mouth, on the spot, and found its contents to be dry green leaves which he suspected to be cannabis. An ambulance was summoned and the accused taken to the District Hospital Butterworth, and thereafter to the General Hospital, Penang, where he underwent head surgery carried out by Dr. Shahabudin bin Raja Mohd. (D.W. 2) who recovered fragments of metal from the head. He was of the opinion that the head injury was consistent with it having been caused by a bullet. Mr. A. Paramarajah (D.W.6), Consultant Surgeon, General Hospital, Penang, corroborated this.

Meanwhile, P3 and its contents (P3A) were sent to the Government Chemist, Mr. Hoong Seng Hong (P.W.7), for analysis and he certified in his report that they were cannabis, weighing 6,044 grammes within the meaning of the Act.

On these facts, the accused was prosecuted with a single count of trafficking in a dangerous drug, to wit, cannabis, weighing 6.044 kilogrammes, in contravention of the provisions of s.39B(1)(a) of the *Dangerous Drugs Act, 1952 (Rev. 1980)* ("the Act"). He was represented by Mr. R. Rajasingam whilst the prosecution was conducted by Encik Mohd. Nordin bin Haji Sulaiman.

At the close of the case for the prosecution, I told counsel for the defence I was not prepared to hear him as I was amply satisfied that there was a case to answer.

Before proceeding to consider the case for the defence I should add, however, that the prosecution called the Chemist (P.W.7) to give oral evidence regarding his analysis of the contents of P3, that is to say, P3A, and also of hand swabs and clothing taken from the accused. His evidence as to P3A confirmed his report but was more detailed and disclosed that it consisted of short stalks, bearing leaves, flowers and fruits, the cannabis material varying in lengths from 3 cm. to 16 cm. He found P3A to be 6,044 grammes in weight having weighed it himself.

As regards P3, he did not examine its outside and, as a result, this made his evidence that no traces of cannabis were detected on the hand swabs and clothing taken from the accused of neutral value.

The accused testified on oath that he was a

gardener attached to the Religious affairs Department, Penang, and, on the day in question, at about 6.00 p.m., he went to Butterworth intending to visit his sister who lived at Jalan Kubang Buaya. He proceeded by bus and having spent some time with his sister decided to return home. He accordingly went to the bus stop near the ferry terminal, but on arrival there, it occurred to him to visit his friend, Abdul Rahim bin Omar (D.W.2). So he boarded a trishaw and went to his friend's house which was situated in the squatter area near the P.P.C. Godowns. Accused suggested they have drinks so together they went to a nearby Indian stall. There, they remained for two-and-a-half hours and consumed five or six bottles of beer and stout and when accused indicated it was time to leave, D.W.2 saw him off. Together they walked, traversing a railway track first, then walking through a large hole in a fence. At that point, the accused said he noticed a Vespa scooter and a Honda C90 motor-cycle about to leave the area near the fencing. D.W.2 called out to the rider of the Vespa saying "berhenti, berhenti" and he did stop. D.W.2 asked him for a lift for the accused up to the main road. The Vespa rider replied he had no spare crash helmet and suggested the accused should ask for one from "Pi'ee", the Honda rider. This the accused did and the Honda rider obligingly gave him a lift. D.W.2 then left, leaving the scene through the same hole in the fence.

The two vehicles then continued – the Honda following the Vespa. After proceeding for a distance of 200 to 300 yards and on approaching a godown, a car came on fast and blocked their path whereupon the Honda rider slowed down his machine, and the accused said he alighted. He heard someone shout "Polis – Lari tembak". As he alighted, he took off his helmet and raised it high and asked: "Apa fasal, Encik?" He claimed he said this twice or thrice. At that point he felt an object hit him with lightning speed, causing him to lose consciousness. When he regained consciousness he found himself in the General Hospital, Penang.

He denied he held any bundle, much less P3, or that he fell from the motor-cycle. He also denied that he knew either the Vespa or Honda riders.

The defence called Abdul Rahim bin Omar (D.W.3), the friend. His evidence was generally speaking along the lines of what the accused testified but if their evidence is compared differences will appear. For example, the accused testified that the stall was 25' to 30' from D.W.3's house, whereas D.W.3 said it was about 700 yards away. Then again, according to accused, as they emerged from the hole in the fence they saw the Vespa and Honda, whereas, D.W.3 said it was only after traversing the P.P.C. Railway track and walking another 200 yards that they saw the Vespa and Honda. Yet, again, according to the accused, when he sought a lift, the Vespa rider referred to the Honda rider as "Piee" whereas, according to D.W.3, the name used was "Aod" or "Ied". Lastly, accused claimed he saw D.W.3 returning through the hole in the fence whereas, D.W.3 said he saw accused off before returning to his house and that accused could not have seen him returning through the hole because he was 200 yards from the fence.

I was satisfied on the evidence taken as a whole that the prosecution had proved the charge against the accused beyond all reasonable doubt. In arriving at this finding I did so mainly because of the impression made on me by the members of the raiding party. I was satisfied, having seen them give their evidence and observed their demeanour, especially under cross-examination, that they were witnesses of truth. On the other hand, I found the accused and his witness wholly unreliable. I regard with considerable scepticism the story of the accused that he coincidentally met the Vespa and Honda riders. Surely, it strains credibility to think that these two riders, who it is not disputed were engaged in transporting ganja, would be prepared to run the risk of detection and possible arrest simply to give the accused, a total stranger, a lift unless, of course, the accused was not an innocent passenger but a party to the illegal enterprise.

There was a point of law taken by Mr. Rajasingam which merits consideration. It was submitted that the charge alleged that the accused had trafficked in 6.044 kilogrammes of cannabis but the evidence of the chemist disclosed that the subject matter thereof, being P3A, included stalk and seeds which do not fall within the definition of cannabis in section 2 of the Act which provided that cannabis means "any plant of the genus cannabis or any part of any such plant (by whatever name designated) but does not include cannabis resin or any of the following products after separation from the rest of the plant, namely, (a) mature stalk of any such plant; (b) fibre produced from mature stalk of any such plant; and (c) seed of any such plant."

It was further submitted that as there was no way of knowing what the rest of P3A weighed, the prosecution had failed in its duty of proving the exact offence charged and also that there was no material to attract the presumption under s.37(da) of the Act of trafficking in cannabis which requires proof of possession of at least 200 grammes of the drug.

To fortify his submission learned counsel added that section 2 of the *Dangerous Drugs (Amendment) Act,* 1983 (Act A553), was introduced for the express purpose of nullifying the decision in *R.* v. *Goodchild (No.2)*[1] which went on appeal to the House of Lords and is reported in [1978] 2 All E.R. 161.

An identical submission was made on behalf of the accused in the case of *Public Prosecutor* v. *Puteh Nordin bin Abdul Rahman & Anor.*[2] but Ajaib Singh., J. rejected it, saying:

"6. Learned counsel for the 1st accused submitted that the weight of the ganja must be less than 2.87 kilograms because the chemist had weighed the contents of the bundle without separating the stalk, fibre and seed. The definition of cannabis in the Dangerous Drugs Act excludes the stalk, the fibre and the seed, and as such the chemist should have removed all these from the plant before weighing. This was not done and therefore the chemist had not ascertained the true weight of the cannabis.

7. I found no merit in this submission. Under the Dangerous Drugs Act "cannabis (except in the expression cannabis resin) means any plant of the genus cannabis or any part of any such plant (by whatever name designated) but does not include cannabis resin or any of the following products after separation from the rest of the plant, namely –

(a) mature stalk of any such plant;

(b) fibre produced from mature stalk of any such plant; and

(c) seed of any such plant;"

This definition consists of two parts. The first part states that any plant of the genus cannabis or any part thereof is cannabis. This is a dangerous drug and trafficking in it is an offence under the Act. The second part in the definition of cannabis states that cannabis does not include cannabis resin and does not include certain products after these products have been separated from the cannabis plant namely mature stalk of the plant, fibre produced from the mature stalk of the plant and seed of the plant.

8. It will be seen therefore that any plant of the genus cannabis or any part thereof comes within the definition of cannabis as a dangerous drug together with its stalk its fibre and seed. All these constitute the plant. It is only when mature stalk and seed are separated that is to say removed from the cannabis plant that these products by themselves are excluded from the definition of cannabis as a dangerous drug. Also excluded is fibre produced from mature stalk of the plant. The chemist was therefore right in weighing the plants she found in the bundle without removing the stalk, fibre and seed."

With respect, I agree.

The presumption under s.37(da) of the Act having arisen, and on my findings there being no rebuttal of the same, I found the accused guilty as charged and I entered conviction.

On the question of sentence, I had earlier given my ruling in writing as to why I considered that I had a discretion as to whether to pass the extreme penalty of death or life imprisonment and after hearing both the prosecution and the defence I concluded that the interests of justice would be sufficiently served if I exercised mercy by passing a sentence of imprisonment for life and six strokes of the rattan. As there is also an appeal by the prosecution alleging inadequacy of sentence I shall give my reasons for having taken this course.

The first point the learned Deputy Public Prosecutor made in his plea in aggravation of sentence was the general observation that on the authority of *Chang Liang Sang & Ors* v. *Public Prosecutor*[3], a decision of the Federal Court, cases of trafficking in dangerous drugs call for the death sentence "other than in most exceptional circumstances."

Next, he drew my attention to the fact that in two cases of trafficking in cannabis, namely, Perlis Criminal Trial No. 8/80 and Kedah High Court Criminal Trial No.6/81, the death sentence had been passed by Mustapha Hussain, J. In each of these cases an appeal is pending. In the former, the quantity of cannabis involved was 6,561.01 grammes and in the latter 63.085 kilogrammes.

He amplified his submission by saying that in this case the quantity of cannabis was sufficient to make 30,220 rolls which would cost $36,264/= in the streets.

Lastly, he stressed that carriers play an important, and, in fact, vital role in the drug world for without them the principals simply cannot operate.

I called for copies of the judgments in the two cases cited by the learned Deputy and having perused the record I find that in the first case the

quantity of cannabis involved was 6,561.1 grammes and the accused persons were not mere carriers but were caught red-handed manufacturing cannabis, and had prepared 2,513 rolls ready for the market at the moment of arrest.

In the second case, the amount of cannabis involved was 63.085 kilogrammes.

I think I need no more than say that the circumstances of the cases cited are poles apart from those of the present and are on that ground alone readily distinguishable.

Mr. Rajasingam in his plea in mitigation urged that the fact that the accused had a previous conviction for possession of a small quantity of ganja and was fined $500/= in the Magistrate's Court, Penang, went to suggest that the accused was an addict and being in need of funds to buy supplies for his personal consumption might have resorted to committing the offence which he did. He stressed that there was a world of difference between a trafficker who was actuated by greed, who could rightly be regarded as trading in death, as opposed to persons, such as the accused, who did so merely to satisfy their personal needs. The submission is attractive but there was no evidence to support it. On the other hand, neither was there evidence to show that in committing this offence the accused was actuated by considerations of pure greed.

There was, however, more substance in the plea that the drug consumed being ganja was not a hard drug and was nowhere near as deleterious or harmful as drugs such as heroin or morphine. I believe it is generally accepted that cannabis is not a drug of addiction comparable to heroin or morphine. Certain views expressed in the Comprehensive Report on Cannabis by the Advisory Committee on Drug Dependence published in January, 1969, by the Home Office in England merit reading but before I refer to them I should mention the composition of the Advisory Committee which prepared the Report. Its members were Baroness Wooton of Obinger, a distinguished Social Scientist and Magistrate of forty years' standing, an Assistant Commissioner of Metropolitan Police, a Stipendiary Magistrate who was also Chairman of Poisons Board, four psychiatrists, two pharmacologists, a representative of the pharmaceutical industry, a sociologist and the editor of a journal of social studies. Adverting to the dangers of cannabis in comparison with other drugs, the Report states that "in terms of *physical* harmfulness, cannabis is very much less dangerous than the opiates, amphetamines, and barbiturates . . ."

On the question of "progression" from cannabis to heroin or other hard drugs, the Report concluded that "it is the personality of the user, rather than the properties of the drug that is likely to cause progression to other drugs."

I was also quite satisfied, on the evidence of Dr. Shahabuddin (D.W.2) and the circumstances of the case taken as a whole, that the accused was deliberately and unjustifiably shot at in the head by Inspector. Mahadi bin Ahmad (P.W.2), a member of the ambush party, despite his strenuous assertions that he had merely fired three shots in the air. But for timely surgical attention the accused may well have succumbed to his injuries. I felt this culpability on the part of Inspector Mahadi was a factor which I could properly take into consideration in assessing sentence.

I did not, however, consider the fact that the accused was married and with children a mitigating factor since he ought to have thought about them not after, but before, committing the offence.

Finally, it goes without saying, that I have given the fullest consideration to the element of public interest which is emphasized in the more stringent measures recently introduced by the *Dangerous Drugs (Amendment) Act, 1983,* to combat the drug menace.

In the result, I passed a sentence of life imprisonment and only six strokes of the rattan as opposed to the maximum of twenty four.

Accused convicted and sentenced.

Solicitors: *R. Rajasingam & Co.*